Supreme Court, U.S.
FILED
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No. 00-

IN THE

Supreme Court of the United States

KEVIN THOMAS AND JOYCE BAKER,

Petitioners,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY, in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kevin Thomas and Joyce Baker, devoted Christians and residential landlords, brought an action challenging Alaska laws which require them to rent property to unmarried cohabitors in violation of their sincere religious beliefs. The United States Court of Appeals for the Ninth Circuit sitting en banc dismissed Thomas's and Baker's claims for lack of an Article III case or controversy and by its decision rendered pre-enforcement constitutional challenges to proscriptive laws virtually impossible to maintain even in the most sensitive First Amendment contexts.

The questions presented are:

1. Do Thomas and Baker have Article III standing to assert First Amendment challenges to proscriptive laws carrying both civil and criminal penalties, which they have violated and continue to violate, which local government agencies are mandated to enforce and have and are actively enforcing against individuals similarly situated, and the enforcement of which government refuses to disclaim?

2. Are Thomas's and Baker's First Amendment claims ripe for judicial review under Article III?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Appellants (Respondents herein): Anchorage Equal Rights Commission, the Municipality of Anchorage, and Paula Haley in her official capacity as the Executive Director of the Alaska State Commission for Human Rights.

Appellees (Petitioners herein): Kevin Thomas, and Joyce Baker.[1]

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[1]Joyce Baker's husband, Gary Baker, who was a party to the action before the District Court, declined to participate in the appeal before the Court of Appeals.

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Appendix I

Notice of Prehearing Conference filed before the Alaska State Commission for Human Rights, dated September 7, 2000 ..... 189a

Petitioners Kevin Thomas and Joyce Baker pray that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the en banc opinion of that court in *Thomas v. Anchorage Equal Rights Comm'n.*

OPINIONS BELOW

The Ninth Circuit's en banc opinions are reported at 220 F.3d 1134 (9th Cir. 2000). Appendix A (App. 1a) The opinions of the Ninth Circuit panel were published at 165 F.3d 692 (9th Cir. 1999). Appendix B (App. 35a); Appendix C (App. 91a). The unreported opinions of the District Court are reprinted at Appendix D (App. 111a) and Appendix E (App. 131a).

JURISDICTION

The Ninth Circuit en banc panel issued its decision on August 4, 2000. (App. 1a) This Court has jurisdiction to issue a writ of certiorari to the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was based upon 28 U.S.C. § 1331; 28 U.S.C. § 2201; and 42 U.S.C. § 1983.

STATUTES INVOLVED

The Ninth Circuit relied upon Article III of the United States Constitution, the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201, the Alaska anti-marital status discrimination law, AS 18.80.100-.240, and the

Anchorage anti-marital status discrimination ordinance, AMC 5.20.020. Appendix F (App. 158a)

STATEMENT OF THE CASE

1. *Introduction.* This petition challenges the Ninth Circuit en banc panel's decision, with one concurrence and one dissent, to dismiss an important constitutional case involving sensitive First Amendment rights to freedom of speech and free exercise of religion for purported want of an Article III case or controversy. The en banc panel's avoidance of the important Constitutional questions in this case under the guise of standing and ripeness, reversing both the three-judge panel and the district court, gives adequate cause for Justice O'Scannlain's concurring question as to whether this decision exemplifies "a court afraid of a case."[2]

The First Amendment claims in this action raise important unanswered questions of constitutional law by calling for a "definitive application of *Employment Division v. Smith*, 494 U.S. 872 (1990), and its newly developed hybrid rights doctrine...." *Id.* Kevin Thomas and Joyce Baker challenge Alaska's subordination of the Free Exercise Clause of the First Amendment to the local interest to deter private marital status discrimination. Equating the Constitutional importance of Alaska's interest to deter marital status discrimination with the National interests to eradicate racial and gender discrimination, the Alaska Supreme Court has ruled that a compelling government interest exists to override a

[2] *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1147 (9th Cir. 2000) (en banc) (O'Scannlain, J., concurring).

landlord's First Amendment religious liberty.[3]

In avoiding this case, belying the opinions of this Court and nearly every other circuit and contradicting its own precedent, the Ninth Circuit virtually eliminated the ability of aggrieved individuals to mount pre-enforcement challenges to proscriptive laws carrying civil and criminal penalties, even in the most sensitive First Amendment contexts where the laws burden freedom of speech, free exercise of religion, and property ownership. Specifically, the Ninth Circuit ruled that Article III prohibits Thomas and Baker from asserting pre-enforcement First Amendment challenges to local housing laws which require them to rent property to unmarried cohabitors, and which prohibit them from engaging in religiously motivated speech.

As Christians, Thomas and Baker believe that unmarried cohabitation is sinful and that if they were to assist or facilitate cohabitation they would commit sin themselves. Were this the full extent of Thomas's and Baker's plight they might have been content to continue quietly in religiously based civil disobedience and hope for the best, namely that they would not be detected and prosecuted. But Thomas's and Baker's religious faith does not allow them such enshrouded solitude, for Thomas and Baker believe that they are commanded by God in the Bible to honor their government and its laws. Put plainly, for Thomas and Baker civil disobedience to their government is another form of sin against God. Thomas and Baker also believe that God would have them speak honestly and openly regarding their faith and how it relates to their religiously based rental policies.

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[3] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279-284 (Alaska) *cert. denied* 513 U.S. 979 (1994) (Thomas, J., dissenting).

Understanding that the local housing laws are proscriptive in nature and carry both civil and criminal penalties, that Alaska government agencies are statutorily and judicially mandated to not be mere complaint-taking bureaus but rather to enforce the laws by seeking out and eradicating discrimination,[4] that the agencies have twice enforced the laws in past legal action against similarly situated landlords through the Alaska Supreme Court,[5] that the agencies are presently enforcing the laws against Alaska Pacific University (a Methodist-based university),[6] and that the agencies refuse to disclaim an intent to enforce the laws, Thomas and Baker filed this action for declaratory and injunctive relief in order to vindicate their federal Constitutional rights.

The Ninth Circuit en banc panel's aberrant decision which overrules *sub silentio* four prior Ninth Circuit opinions, should be reviewed by this Court because it conflicts directly and in principle with this Court's and nearly every other Circuit Court of Appeals' decisions regarding Article III standing and ripeness. The Ninth Circuit's decision should also be reviewed because it impermissibly closes federal courthouse doors to citizens whose sensitive First Amendment rights to free speech and religious liberty are aggrieved by government proscription. By *Thomas*, it will be virtually impossible for citizens in nine states to obtain federal judicial review of unconstitutional laws

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[4]*See Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union v. Thomas*, 551 P.2d 942, 945 (Alaska 1976).

[5]*Swanner*, 874 P.2d 274; *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989).

[6]*Alaska State Comm'n for Human Rights ex rel. Kristiann Kutzler v. Alaska Pac. Univ.*, ASCHR No. C-96-010 (Alaska State Commission for Human Rights). Appendix G (App. 162a)

without first subjecting themselves to criminal or civil enforcement. Of course, once state action is initiated, under the *Younger* abstention doctrine the only federal review which will be available to these citizens regarding their federal constitutional rights will be the discretionary review of this Court after the completion of lengthy state proceedings.[7]

Thomas and Baker "genuinely and immediately need to know whether a constitutionally valid law prohibits them from acting as they are and have been in the exercise of their religious beliefs," *Thomas*, 220 F.3d at 1151 (Kleinfeld, J., dissenting), and from speaking honestly and openly about their religious beliefs related to marriage and cohabitation. This Court should preclude the Ninth Circuit from "slam[ming] the courthouse door on their suit requesting an answer." *Id.*

2. *Facts*. Kevin Thomas and Joyce Baker are devoted members of the Christian faith. Baker has attended the Christian church for more than fifteen years, from time to time serving as a deaconess.[8] Thomas has attended the Christian church for many years working with youth. As Christians, Thomas's and Baker's religious beliefs are founded upon the

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[7] *See Younger v. Harris*, 401 U.S. 37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 (1986). By the Ninth Circuit's expansive application of the *Younger* abstention doctrine, the pending state proceeding which operates to foreclose federal jurisdiction need not be a proceeding to which the aggrieved citizen is a party, but instead merely a proceeding into which the citizen may intervene. *See Green v. City of Tucson*, 217 F.3d 1081, 1082-83 (9th Cir. 2000).

[8] An "Elder," "Deacon," or "Deaconess" in the Christian church is a man or woman who oversees the affairs of the church. The Bible delineates the qualifications of an Elder, Deacon, or Deaconess. (App. 166a, *quoting I Timothy* 3:1-7; *Titus* 1:5-9.) Pertinent affidavits contained in the Excerpt of Record before the Ninth Circuit are set forth at Appendix H. (App. 165a)

Bible, which they believe to be the absolute, true, and infallible word of God. (App. 165a, 171a)

Thomas and Baker have three religious beliefs which are central to this case. First, they believe that cohabitation between unmarried couples constitutes the sin of fornication and is grievously offensive to God.[9] Second, they believe that if they were to assist or facilitate someone else's cohabitation, they would commit sin themselves, render themselves hypocrites, and disqualify themselves from serving as an Elder, Deacon, or Deaconess in the Christian church. Third, they believe that they are commanded by God to honor their government and its laws. (App. 166a-169a, 172a-176a)

Thomas's and Baker's religious beliefs regarding cohabitation are rooted in a widely held tradition within Christianity extending from the Old Testament[10] to the New Testament,[11] the teachings of Christ,[12] the Apostle Paul,[13] the

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[9]To "cohabit" means "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary* 259 (1980).

[10]*Genesis* 2:24; *Exodus* 22:16; *Leviticus* 19:20; *Deuteronomy* 22:13-21, 23:17; *Proverbs* 2:16, 5:3-6, 6:24-29, 7, 29:3; *Ecclesiastes* 7:26; *Hosea* 4:11.

[11]*Acts* 15:19-20; *Jude* 7; *Revelation* 2:14, 21:18, 22:15.

[12]*Matthew* 15:16-20; *Mark* 7:18-23.

[13]*Romans* 1:29; *I Corinthians* 5:9-11, 6:9; *II Corinthians* 12:21; *Galatians* 5:19-21; *Ephesians* 5:5; *Colossians* 3:5-6; *I Thessalonians* 4:3-4; *I Timothy* 1:8-11; *Hebrews* 13:4.

Apostle Peter,[14] and the Reformation leader John Calvin.[15] Thomas and Baker sincerely believe that marriage between a man and a woman is the only relationship, created by God, in which two people are to live together in sexual intimacy. (App. 166a-167a, 172a-174a) Thomas's and Baker's religious belief that they are commanded by God to honor their government and its laws is founded upon the teaching of the Apostle Paul.[16] Thomas and Baker sincerely believe that civil disobedience to their government is another form of sin against God.

Baker owns residential properties in Anchorage, Alaska, and conducts business as a landlord by renting to tenants. Thomas also owns and manages residential rental properties in Anchorage, Alaska. Thomas's and Baker's rental businesses are significantly impacted by their Christian faith because they commit themselves to practice their beliefs in all aspects of their lives, including their commercial activities. (App. 167a, 173a-174a) Thomas and Baker rent property without regard to race, religion, gender, and marital status.[17] However, based solely upon their Christian beliefs, Thomas and Baker will not

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[14]*I Peter* 4:1-6.

[15]John Calvin, *Calvin's Commentaries: The Epistles of Paul to the Romans and to the Thessalonians* 359 (David W. Torrance & Thomas F. Torrance, eds. Ross Mackenzie trans., 1960).

[16]*Romans* 13:1-7 (New American Standard trans.) ("Every person is to be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore, whoever resists authority has opposed the ordinance of God; and they who have opposed will receive condemnation on themselves.")

[17]Thomas and Baker rent to persons of all races, of any religion, of both genders, single persons, men and women married to one another, separated or widowed persons, single parents and grandparents. (App. 167a, 174a)

rent to unmarried couples who cohabit. *Id.*

Thomas and Baker offer their properties for rent under management policies which prohibit rental to unmarried cohabitors. Thomas and Baker have previously declined to rent to unmarried cohabitors. (App. 166a-167a, 174a)[18] Thomas and Baker continue in this rental practice and periodically are required to turn unmarried cohabitors away in order to remain true to their Christian convictions. *Id.* The Alaska and Anchorage housing laws[19] have been interpreted to require landlords to rent residential property to unmarried cohabitors regardless of religious beliefs. *Foreman*, 779 P.2d 1199; *Swanner*, 874 P.2d at 274. The laws also prohibit Thomas and Baker from offering their properties for rent pursuant to their religiously based management policies. AS 18.80.240(4); AMC 5.20.020(D).[20] Finally, the laws prohibit Thomas and Baker from engaging in religiously motivated speech by (1) inquiring of the marital status of potential tenants;[21] or (2) making any communication or statement which indicates a

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[18]Thomas and Baker always ask for a potential tenant's marital status. They also inform unmarried cohabitors of their religious beliefs regarding marriage and cohabitation because they believe that it would be contrary to God's will to lie, and they believe that they should stand up and be recognized as Christ's followers. (App. 168a, 174a)

[19]AS 18.80.240; AMC 05.20.020.

[20]Both laws make it "unlawful" to "offer ... real property with the understanding that a person may be discriminated against" "because of ... marital status." *Id.*

[21]AS 18.80.240(3); AMC 5.20.020(C).

preference against renting to unmarried cohabitors.[22]

Although Alaska and Anchorage adopted their housing laws in 1975, enforcement of the marital status provisions against landlords like Thomas and Baker has been clouded for all but nine months of the laws' existence. For the first thirteen years, the laws were not known to apply to unmarried cohabitors. The Alaska Supreme Court did not interpret the laws to prohibit discrimination against unmarried cohabitors until 1989. *Foreman*, 779 P.2d 1199. During the next five years, the laws were clouded by constitutional challenge. The constitutionality, both state and federal, of enforcing the laws against religious landlords was not decided by the Alaska Supreme Court until 1994. *Swanner*, 874 P.2d 274. The enforcement against Swanner started in 1989 immediately following the decision in *Foreman* applying the laws to unmarried cohabitation, and did not conclude until October, 1994. *Id. cert. denied* 513 U.S. 979 (Thomas, J., dissenting).[23]

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[22]On its face, the Anchorage ordinance has enormous breadth, literally prohibiting any "statement" of any "preference" regarding refusing to rent to unmarried cohabitors in any context. *See* AMC 5.20.020(C).

[23]The conclusion of the *Swanner* case left a substantial cloud over the laws. Dissenting from the denial of certiorari in *Swanner*, Justice Thomas explained that he was "quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is 'compelling' enough to satisfy" the stringent standards established by this Court in *Sherbert v. Verner, 374 U.S. 398 (1963)*; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). *Swanner*, 513 U.S. at 980-981. Justice Thomas remarked: "If, despite affirmative discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a 'compelling' interest – that is, a 'paramount' interest, an interest 'of the highest order' – then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word

Thomas and Baker filed this civil rights action in July, 1995. Nearly two years later enforcement of the laws against Thomas and Baker was permanently enjoined by the district court. (App. 156a-157a) That injunction remained in effect until August 4, 2000, when the Ninth Circuit issued its en banc decision. *Thomas*, 220 F.3d 1134. The window of opportunity for unfettered enforcement of these laws against religious landlords like Thomas and Baker has been narrow.

Thomas and Baker filed their complaints in this action knowing that the Alaska Supreme Court ruled in 1976 that the Alaska State Commission for Human Rights ("ASCHR") is statutorily commanded to not be a mere complaint-taking bureau but rather to enforce the discrimination laws and to *not* allow the laws to go into desuetude.[24] Thomas and Baker also knew that for the previous decade the ASCHR and the Anchorage Equal Rights Commission ("AERC") had enforced the laws against landlords who refused to rent to unmarried couples.[25] During the pendency of this case AERC threatened

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compelling of any meaning and seriously undermines the protection for exercise of religion...." *Id.* at 982.

[24]*Hotel, Motel*, 551 P.2d at 945 ("[T]he legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the sale, lease, or rental of real property.") AS 18.80.200 declares "as a matter of legislative finding" that it is the policy of the State of Alaska to "eliminate and prevent discrimination in" "the" "lease, or rental of real property because of" "marital status."

[25]*Foreman*, 779 P.2d 1199 (mid-1980s-1989); *Swanner*, 874 P.2d 274 (1989-1994). Regardless of whether Foreman was a religious individual or not (*Thomas*, 220 F.3d at 1140-1141 and n.6), the agencies enforced the laws against him. *See Foreman*, 779 P.2d 1199; *Thomas*, 220 F.3d at 1145 (O'Scannlain, J., concurring).

additional action against Tom Swanner "or any other landlord who refuses to rent to unmarried couples regardless of the landlord's religious beliefs."[26]

After the district court's permanent injunction, ASCHR filed a complaint to enforce the marital status laws against Alaska Pacific University ("APU")[27] due to APU's policy to not rent university housing to unmarried cohabitors. *See Alaska State Comm. for Human Rights ex rel. Kristiann Kutzler v. Alaska Pac. Univ.*, ASCHR No. C-96-010 (Alaska State Commission for Human Rights). Appendix G (App. 162a)[28] Throughout this action, including at oral argument before the Ninth Circuit en banc panel on March 23, 2000, the government has refused to disavow an intent to enforce the laws against Thomas and Baker.

3. *The Federal Constitutional Questions Were Timely*

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[26](App. 187a). Swanner's affidavit states that in a telephone call on January 9, 1996, AERC's staff informed him that the agency would enforce the marital status discrimination laws against him or any other landlord who refused to rent to unmarried couples. *Id.*

[27]APU, formerly Alaska Methodist University, is a college with a religious beginning and foundation. <*www.akohwy.com/a/alpauniv.htm*>.

[28]ASCHR's complaint charged APU with refusing to rent university housing to a female student who "proposed to occupy the apartment with her boyfriend" because "she was not married to her boyfriend." (App. 162a-163a) AS 18.80.100 authorizes the ASCHR executive director to file complaints against violating landlords. An adjudicatory hearing prosecuted by ASCHR follows failed conciliation. *See* AS 18.80.110; AS 18.80.120. ASCHR is mandated to prosecute, without citizen complaint, landlords who violate AS 18.80.240. *Hotel, Motel*, 551 P.2d at 945. After the en banc panel dismissed Thomas's and Baker's claims, ASCHR scheduled a pre-hearing conference in the APU matter for September 21, 2000. Appendix I (App. 189a)

And Properly Raised. Thomas and Baker filed complaints for injunctive and declaratory relief arguing that the local housing laws violate the Free Exercise Clause of the First Amendment as applied to them. The parties argued the Article III issues in cross-motions for summary judgment and the district court ruled that Thomas's and Baker's claims are justiciable. (App. 111a)

ASCHR did not originally brief Article III issues to the Ninth Circuit. AERC briefed only prudential ripeness. Justice Hawkins, however, raised Article III issues at oral argument. The three-judge panel affirmed on a divided vote. *Thomas*, 165 F.3d 692. Respondents petitioned for rehearing en banc. The Ninth Circuit requested additional briefs regarding standing and ripeness. The Ninth Circuit granted rehearing en banc and withdrew the panel decision. 192 F.3d 1208. The parties again filed supplemental briefing regarding Article III issues. The en banc panel heard oral argument. On August 4, 2000, the en banc panel dismissed Thomas's and Baker's claims for want of an Article III case or controversy. 220 F.3d 1134.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's en banc decision that Thomas and Baker do not present a justiciable Article III case or controversy through their First Amendment pre-enforcement action, was made in contexts where: (1) the challenged Alaska housing laws are proscriptive in nature and carry both civil and criminal penalties; (2) the challenged laws prohibit Thomas's and Baker's religiously motivated rental practices and free speech; (3) the laws require Thomas and Baker to choose between the equally burdensome options of giving up their livelihoods as landlords, giving up their property, violating their religious

beliefs regarding rental to unmarried couples, or violating their religious beliefs about honoring the law, thereby risking criminal prosecution or costly civil enforcement; (4) Alaska government agencies are statutorily and judicially commanded to not allow the laws to go into desuetude or to be mere complaint-taking bureaus, but instead to actively enforce the laws by seeking out and eradicating discrimination through criminal prosecution and civil enforcement; (5) the window of opportunity for enforcement of the challenged laws has been narrow because the laws have been clouded by questions of legal interpretation and constitutional exemption for approximately twenty-four of their twenty-five year existence; (6) government agencies have nonetheless previously enforced the laws against landlords similar to Thomas and Baker in cases which have twice proceeded to the Alaska Supreme Court; (7) one agency recently filed an enforcement action which remains pending today against a Methodist university with rental policies identical to Thomas and Baker; and (8) the agencies refuse to disclaim an intent to enforce the laws against Thomas and Baker. The decision is in error because it "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court should grant the petition and review the Ninth Circuit's decision in order to correct the error.

The Ninth Circuit's decision that Thomas's and Baker's claims do not present an Article III case or controversy in the above contexts conflicts directly and in principle with decisions from nearly every other United States Circuit Court of Appeal. Sup. Ct. R. 10(a). This Court should grant the petition and review the Ninth Circuit's decision in order to correct the aberration.

This case presents important recurring unanswered questions of Constitutional law which should be settled by this Court. Sup. Ct. R. 10(c). This Court should delineate the

circumstances under which Article III allows a civil rights litigant to mount a First Amendment pre-enforcement challenge to proscriptive laws carrying civil and criminal penalties. This Court also should establish what constitutes a credible threat of prosecution for purposes of Article III standing and ripeness.

I. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS WITH THIS COURT'S DECISIONS REGARDING ARTICLE III STANDING AND RIPENESS

The Ninth Circuit's holding that Thomas's and Baker's First Amendment claims fail for want of an Article III case or controversy conflicts with this Court's controlling precedent. The decision most directly on point is *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988). *Booksellers* involved a pre-enforcement challenge to a Virginia statute which made it unlawful, subject to criminal penalty, to knowingly display sexually explicit material accessible to juveniles. *Id.* at 386. The Virginia law required the plaintiffs (bookstores) to choose between (1) ceasing to sell covered material, (2) barring juveniles from their establishments, or (3) modifying the manner in which they displayed sexually explicit material. *Id.* at 388.

In *Booksellers* the Court unanimously ruled that the plaintiffs' claims presented a justiciable Article III case or controversy[29] stating that it was "not troubled by the pre-

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[29] Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" or "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and* State, 454 U.S. 464, 469 (1982); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-298 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458 (1974); *Aetna Life Ins. Co.*

enforcement nature of this suit," which was brought before the Virginia law even became effective. *Id.* at 392-393. The Court concluded that the plaintiffs' claims were justiciable principally because (1) the Virginia law was "aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution,"[30] and (2) "[t]he State has not suggested that the newly enacted law will not be enforced." *Id.*

In reaching this conclusion, the Court found significant, and virtually determinative, the possibility that the challenged law might chill First Amendment rights:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one

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of Hartford Conn. v. Haworth, 300 U.S. 227, 239 (1937). The "case or controversy" requirement is reflected in the intertwining doctrines of standing and ripeness. While standing is primarily concerned with who is a proper party to litigate a particular matter, *FEC v. Akins*, 524 U.S. 11, 19-21 (1998); *Valley Forge*, 454 U.S. at 469; *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Steffel*, 415 U.S. at 458-459; *Doe v. Bolton*, 410 U.S. 179, 188 (1973), ripeness addresses when that litigation may occur. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) ("ripeness is peculiarly a question of timing"); *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-201 (1983) ("premature adjudication"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-154 (1967).

[30] *Id.* at 392 *citing Craig v. Boren*, 429 U.S. 190, 194 (1976); *Bolton*, 410 U.S. at 188.

> of self-censorship; a harm that can be realized even without an actual prosecution.

Id. at 393.

The Ninth Circuit's decision that Thomas's and Baker's claims are not justiciable conflicts with *Booksellers*. The Alaska and Anchorage housing laws are aimed directly at landlords like Thomas and Baker, and have been interpreted to require rental to unmarried cohabitors regardless of religious beliefs.[31] Unlike the law in *Booksellers* which had not yet even become effective, the Alaska and Anchorage laws, which carry both civil and criminal penalties,[32] are currently in effect, they have been civilly enforced in the past against identical landlords in actions twice proceeding through the Alaska Supreme Court, and they are currently being enforced against an identical landlord, Alaska Pacific University.

Even more compelling than *Booksellers*, Thomas and Baker have violated the laws in the past by turning away unmarried cohabitors, at present they violate the laws by offering their properties for rent under management policies which prohibit rental to unmarried cohabitors,[33] they are periodically required to violate the laws by turning away unmarried cohabitors, and they plan to violate the laws in the

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[31] *Foreman*, 779 P.2d at 1199; *Swanner*, 874 P.2d 274.

[32] *See* AS 18.80.270 (misdemeanor punishable by $500 fine or up to 30 days in jail). Both laws allow the agencies to initiate investigations, hold hearings, compel attendance, enjoin violations, and issue appealable compliance orders. *See* AS 18.80.100-.145; AMC 5.30.010-.090.

[33] AS 18.80.240(4); AMC 5.20.020(D).

future by refusing rental to unmarried cohabitors.[34]

While this action was pending AERC threatened additional action against Tom Swanner.[35] ASCHR is statutorily and judicially commanded to enforce the laws without waiting for a citizen complaint and is not allowed to be a mere complaint-taking bureau. Like the State of Virginia, the government here has pointedly refused to disclaim an intent to enforce the laws against Thomas and Baker.[36] The only thing separating Thomas and Baker from prosecution for their now known and admitted past and present acts of discrimination is prosecutorial caprice.[37]

Like *Booksellers*, Thomas and Baker are presently harmed and chilled in their First Amendment rights because

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[34]Although the majority of the en banc panel expressed "prudential" ripeness concerns because they did not understand the exact combinations of unmarried individuals to whom Thomas and Baker would decline rental, *Thomas*, 220 F.3d at 1142 and n.8, this lack of understanding disregards the record. Justices O'Scannlain and Kleinfeld observed that, "it is hard to take seriously" "the majority's prudential concern about the need for a record to show just whom" Thomas and Baker "propose to discriminate against." 220 F.3d at 1144 n.1, 1149. Thomas and Baker have been crystal clear that the unmarried individuals to whom they decline rental are those who intend to "cohabit," *i.e.* live together in a sexually intimate relationship, in their properties. (Appendix H, App. 166a-169a ¶¶ 4-6, 10, 13; 172a-176a, ¶¶ 5-6, 10, 12.)

[35]App. 187a-188a; *Swanner*, 874 P.2d 274.

[36]At oral argument before the en banc panel, Justice O'Scannlain squarely asked Respondents to disclaim an intent to prosecute Thomas and Baker and Respondents refused to give the disclaimer.

[37]*See Hotel, Motel*, 551 P.2d at 945 (ASCHR has no discretion to ignore violations of the marital status discrimination law).

they are now faced with the equally onerous choices of (1) abandoning their livelihoods; (2) disposing of their properties; (3) self-censoring their religiously motivated speech;[38] (4) refraining from advertising for tenants who do not present religious concern; (5) complying with the laws by renting to unmarried cohabitors, thereby violating their religious beliefs regarding marriage, cohabitation, and facilitation of sin; and/or (6) disobeying the laws, regarding both discrimination and speech, thereby violating their religious beliefs about honoring their government and its laws. The danger of these laws is in large measure one of present religious injury and self-censorship; harm that is realized even without prosecution. *Id.* at 393.

The en banc panel's conclusion also cannot be squared with *Doe v. Bolton*, 410 U.S. 179. In *Bolton*, doctors alleged that Georgia abortion statutes infringed their associational and occupational liberty. *Id.* at 185. This Court had no difficulty

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[38]"[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) *quoting Police Dept. v. Mosely*, 408 U.S. 92, 95 (1972). With respect to non-commercial speech, this Court "has sustained content based restrictions only in the most extraordinary circumstances." *Id. citing Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538-539 (1980). Commercial speech is "speech which does no more than propose a commercial transaction," *id. quoting Virginia State Bd. of Pharm. v. Virginia Cit. Consum. Counc.*, 425 U.S. 748, 762 (1976), and which is motivated by purely economic interest. *Id.* Thomas's and Baker's motivation for engaging in speech regarding the marital status of tenants, cohabitation, and marriage is purely religious. There is no "economic interest," *Virginia*, 425 U.S. at 761, which motivates this speech. The speech is inimical to Thomas's and Baker's economic interests because it relates to a topic which could deprive them of a ready, willing, and financially qualified tenant. Thomas's and Baker's "economic interests" beckon them to ignore the unmarried status of cohabiting tenants.

concluding that the doctors, licensed physicians consulted by pregnant women, presented justiciable claims despite the fact that none of them had ever been prosecuted, or threatened with prosecution, for violation of the law:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment.

Id. at 188.

Like the doctors subject to the Georgia abortion laws in *Bolton*, Thomas and Baker are the landlords against whom the Alaska and Anchorage marital status laws directly operate.[39]

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[39]The Alaska and Anchorage laws are not "generally applicable" because they are "under inclusive," *Smith*, 494 U.S. at 881-882; *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-545 (1993), in ways which devalue religious motivation and discriminate against religious landlords. Both laws contain gaping exceptions. By way of the Alaska statute a landlord can legally discriminate against unmarried cohabitors provided he simply classifies his rental units as being for "married couples only." AS 18.80.240. However, if Thomas and Baker decline to rent to unmarried cohabitors for religious reasons, they are guilty of a misdemeanor and subject to fine and jail. *Id.*; AS 18.80.270. By way of the municipal ordinance, a landlord may decline to rent to unmarried cohabitors if the rental unit shares common living space with the landlord's home. AMC 5.20.020. However, if Thomas and Baker decline to rent their stand-alone units to an unmarried couple for religious reasons, they violate the ordinance. By way of these laws, marital status discrimination, the so-called "social evil" which the laws are supposedly designed to eliminate, *Swanner*, 874 P.2d at 283, is specifically allowed for secular reasons. When a law punishes religiously motivated action in order to accomplish objectives which government does not deem worthy of protection against

Even more compelling than *Bolton*, where the Georgia abortion laws had never been enforced or threatened against the plaintiffs and also were not presently being enforced or threatened against other doctors, *id.* at 188-189, the Alaska and Anchorage laws have never been enforced or threatened directly against Thomas and Baker but they have been enforced and threatened against identical landlords in the recent past and present.[40] Further, the laws here, like the Georgia abortion laws, are fairly recent in application and effect and they have not been allowed to slip into desuetude. *Id.* at 189.[41] Thomas and Baker, like the doctors in *Bolton*, "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 188.[42]

The Ninth Circuit's analysis regarding "threat" and "history" of enforcement (220 F.3d at 1140-1141) appears to be a misapplication of *Poe v. Ullman*, 367 U.S. 497 (1961). In

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identical secular conduct, the laws are not generally applicable and they violate government neutrality toward religion demanded by the First Amendment. *Hialeah*, 508 U.S. at 546; *accord Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-366 (3rd Cir. 1999) (police department policy prohibiting beards which made exception for "medical" but not "religious" beards, was not generally applicable).

[40]*Foreman*, 779 P.2d 1199; *Swanner*, 874 P.2d 274; *Alaska Pacific University* (App. 162a-164a); *Swanner* (App. 187a-188a).

[41]The Georgia statute was five years old at the time of *Bolton*. *Id.* at 181-182. The Alaska and Anchorage laws had been applied to unmarried cohabitors only six years, *Foreman*, 779 P.2d 1199, and held applicable to religious landlords like Thomas and Baker only nine months, *Swanner*, 874 P.2d 274, as of the filing of this action.

[42]*Accord Steffel*, 415 U.S. at 480 (Rehnquist, J., concurring) ("the declaratory judgment procedure is an alternative to pursuit of an arguably illegal activity").

Bolton this Court reversed a similar misapplication of *Poe*:

> In holding that the physicians . . . did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe v. Ullman*. . . . But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told, physicians were prosecuted.

Id. at 188-189.

Unlike the contraceptive laws in *Poe* which had been in effect for close to a century and not enforced for decades despite widespread violation (*Poe*, 367 U.S. at 501-502), the Alaska and Anchorage laws are of fairly recent origin (1975), and the laws' application to unmarried cohabitation (1989, *Foreman*, 779 P.2d 1199) and religious landlords (1994, *Swanner*, 874 P.2d 274) is of very recent origin. Since the mid-1980s Alaska and Anchorage have civilly enforced the laws against landlords like Thomas and Baker nearly non-stop.[43] Moreover, the window of opportunity for unfettered enforcement of these laws against religious landlords has been narrow. Contrary to the Ninth Circuit's conclusion, Thomas and Baker present justiciable claims because this case parallels *Bolton* rather than *Poe*.

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[43] *Foreman* (1986-1989); *Swanner* (1989-1994), *Alaska Pacific University* (1997-2000).

There is no way to square the Ninth Circuit en banc panel's decision (220 F.3d at 1140-1141) with *Epperson v. Arkansas*, 393 U.S. 97 (1968). *Epperson* involved a biology teacher's challenge to the Arkansas anti-evolution statute which made it a misdemeanor, and cause for employment termination, to teach the theory of evolution to public school students. 393 U.S. at 100-101. Despite the fact that (1) the teacher had never violated the law, been prosecuted, been threatened with prosecution, been fired, or even threatened with firing, (2) in the law's 40 year existence no one had ever been prosecuted or fired, and (3) the law was "more of a curiosity than a vital fact of life," this Court ruled that it was its "duty to decide the issues presented." *Id.* at 102. Under the controlling rule of *Epperson*, where this Court found that the mere existence of a proscriptive law chilling First Amendment rights sustained justiciability, the Ninth Circuit has a "duty to decide the issues presented," *id.*, in this case.

The Ninth Circuit's "short shrift" "dismissal" of Thomas's and Baker's present religious injury, 220 F.3d at 1139, 1147 n.4, by being required to violate the law, conflicts with *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). In *Schempp*, this Court found that a present religious injury, no matter how slight it might seem from a secular perspective – there simply requiring students either to sit through minutes of personally objectionable scripture reading or to absent their classroom, sustains justiciability. *Id.*[44]

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[44]The en banc majority off-handedly dismissed as "circular argument" (220 F.3d at 1139), Thomas's and Baker's point that, regardless of any civil or criminal enforcement against them, their religious liberty is presently harmed because they are forced into a "catch-22" situation wherein they must violate their religious belief regarding honoring the government and its laws (Romans 13) in order to abide by their religious beliefs regarding

The Ninth Circuit's decision conflicts directly and in principle with other decisions of this Court as well. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (suit commenced four years before law was to take effect, and resolved *on the merits* by this Court two years before its effective date); *Akins*, 524 U.S. at 25 (voters seeking information from AIPAC presented a justiciable challenge to the FCC's determination that AIPAC was not a "political committee" and thus not subject to disclosure, despite the possibility that the FCC might have exercised its discretion to decline prosecution against AIPAC for non-disclosure even if the voters were right that AIPAC was a "political committee");[45] *Babbitt*, 442 U.S. at 298-301

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marriage, cohabitation and facilitation of sin. This "dismissive" denouncement is both incorrect and constitutionally impermissible. Thomas's and Baker's point would be "argument" if it was simply their own logic, but it is not because it is a tenet of their faith. (App. 169a, 176a) Thomas's and Baker's point would be "circular" if it had originated with them, but it did not because it originated in A.D. 56 with the Apostle Paul's writing of his Epistle to the Christians in Rome (particularly the portion of that epistle now referred to as chapter 13 verses 1-7). Zodhiates, *The Complete Word Study New Testament*, The Epistle of Paul to the Romans, p. 498 (AMG Publishers 2nd ed., June 1992). And, according to *II Timothy* 3:16 "[a]ll scripture is given by inspiration of God." According to *Frazee v. Illinois Dep't of Empl. Sec.*, 489 U.S. 829, 834-835 (1989) and *Thomas v. Review Board*, 450 U.S. 707, 715-716 (1981), the Ninth Circuit is not allowed to scoffingly dismiss the substance of Thomas's and Baker's sincerely held religious beliefs. *See Thomas*, 220 F.3d at 1147 n.4 (O'Scannlain, J., concurring). Thomas's and Baker's only relief from this dilemma would come by forfeiting their Fourteenth Amendment occupational liberty. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("[Fourteenth Amendment 'liberty'] denotes . . . the right of the individual . . . to engage in any of the common occupations in life.")

[45]Contrary to *Akins*, the Ninth Circuit rejected Thomas's and Baker's claims because of the astronomical potential that Thomas and Baker might never be subject to civil enforcement if no unmarried tenant ever again asked to rent from them and, thereafter, filed a complaint with Respondents.

(plaintiffs presented justiciable challenge to union election procedures of Arizona statute even though they "admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future");[46]

In this respect, the Ninth Circuit ignored *Hotel, Motel*, 551 P.2d at 945, the criminal penalty of AS 18.80.270, and *Epperson*, 393 U.S. at 102. The Ninth Circuit also ignored the State of Alaska's argument that unmarried cohabitation is "becoming the most common living arrangement in the country" encompassing 32% of all households. *Haley's En Banc Brief*, 48 and n.18 *citing* Smith, Tom W., *The Emerging 21st Century American Family*, The General Social Survey, conducted by the University of Chicago's National Opinion Research Center, November 24, 1999 (available at <www.norc.edu/online/emerge/htm>); *Marital Status and Living Arrangements*, March 1998 (update), U.S. Bureau of the Census, Current Population Reports (available at U.S. Census Bureau Home Page <www.census.gov>).

[46]The plaintiffs in *Babbitt* presented justiciable claims against the challenged law's union election procedures despite their failure to invoke, and their disclaimer of an intent to invoke, election procedures because (a) the law worked a present harm to their associational right to organize (they were dissuaded from holding elections because of the law's onerous procedures) and (b) they faced potential future harm to be incurred in the event of an election (which they had no intention of holding) which could not be remedied legally. *Id.* at 299-301 and n.12. Here, Thomas and Baker presently violate the laws, plan to continue violating the laws, are presently harmed in their religious beliefs and/or occupational liberty by the laws, and later legal action cannot remedy their prior coerced religious infidelity. Thomas's and Baker's situation is thus significantly different than that of cases wherein the plaintiffs' injury hinges upon such contingencies as (a) their unplanned future engagement in unspecified illegal conduct, and (b) the government's unpredicted and unsanctioned unconstitutional response. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 101-103 (1983) (plaintiffs stated no intent to again engage in any illegal conduct and government had no policy directing unconstitutional response to general illegal activity); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (plaintiff's remaining son had no intent to engage in any illegal conduct whereby he would be threatened by police use of deadly force); *Rizzo v. Goode*, 423

Abbott, 387 U.S. at 148-153 (purely legal questions do not present prudential ripeness concerns, and plaintiffs subject to proscriptive laws which mandate specified conduct subject to penalty for non-compliance present justiciable claims);[47] and *Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993) ("In some cases, the promulgation of a regulation will itself affect the parties concretely enough to satisfy . . . [ripeness]").[48]

U.S. 362, 371-373 (1976) (same). Here, Thomas and Baker have a specific plan to continue violating specific laws which presently harm them whether they act lawfully or unlawfully.

[47]In *Abbott* this Court also found unpersuasive the government's attempt to avoid justiciability by claiming that the most it would do at some uncertain date in the future was seek civil, rather than criminal, enforcement of the challenged law. 387 U.S. at 154. Moreover, here ASCHR does not have enforcement discretion as in *Abbott*, 387 U.S. at 151-152 (*Hotel, Motel*, 551 P.2d at 945), and Respondents have never disclaimed an intent to criminally prosecute. Furthermore, in *Abbott* this Court found it persuasive that the government, like Anchorage and Alaska, had spent considerable effort and money defending the challenged laws in the action at hand. *Id.* ("the Justice Department is defending this very suit"). As in *Abbott* this case presents pure legal questions.

[48]*Citing Abbott*, 387 U.S. at 148-149, 152-153; *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171-172 (1967) (if proscriptive regulation is felt by plaintiff in every day affairs, then claim is presently ripe). *See also Steffel*, 415 U.S. at 459 (threats of enforcement and actual enforcement against another similar individual rendered action justiciable despite the fact that plaintiff ceased activity and did not continue); *Rail Reorganization Act Cases*, 419 U.S. at 143 and n. 29 (certain future injury from law supports finding of justiciability even though the exact date of the injury cannot be predicted); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 and n.12 (1980) (a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even "prior to application of the regulation to a particular [company's] request for a variance"); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 200-202 (1983) (Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the

II. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS DIRECTLY AND IN PRINCIPLE WITH DECISIONS FROM NEARLY EVERY OTHER CIRCUIT COURT OF APPEAL

The Ninth Circuit's en banc decision in *Thomas* conflicts directly and in principle with decisions from nearly every other circuit court of appeal:[49] ***First Circuit***: *Rhode Island Assoc. of Real., Inc. v. Whitehorse*, 199 F.3d 26, 28 (1st Cir. 1999) (challenge to 20 year old law with criminal penalties was justiciable, despite the fact that no person had ever been charged or prosecuted under the law, simply because the Attorney General had not disclaimed enforcement and was statutorily mandated to enforce the law);[50] ***Second Circuit***:

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utilities had not yet applied for a certificate.); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (case was justiciable despite the fact that the challenged law had not yet even gone into effect because the future injury was sufficiently predictable).

[49]As Justices O'Scannlain and Kleinfeld concluded below, the en banc decision conflicts with multiple prior panel decisions of the Ninth Circuit. *See Thomas*, 220 F.3d at 1142-1148; *San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121 (9th Cir. 1996); *Adult Video Ass'n v. Barr*, 960 F.2d 781 (9th Cir. 1992), *vacated sub nom. Adult Video Ass'n v. Reno*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994); *San Francisco County Dem. Cen. Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996). *See also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1153-1156 (9th Cir. 2000).

[50]*Contra*, *Thomas*, 220 F.3d at 1140-1141 (finding that Thomas and Baker face no threat of enforcement under a six year old interpretation of the law despite past government enforcement and statutory and judicial mandates to enforce the law without citizen complaint, and despite government refusal to disclaim enforcement). *See also Stern v. United*

Nutritional Hlt. All. v. Shalala, 144 F.3d 220, 226-227 (2nd Cir. 1998) (present injury in the form of 540 day delay in speech, *i.e.*, prior restraint, made claim justiciable regardless of any indication of any threat of enforcement in the event that the plaintiff had simply engaged in the proposed speech pending the government's evaluation of its claim);[51] ***Third Circuit***: *Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1458-1464 (3rd Cir. 1994) (clergyman's challenge to law which prohibited speech against homosexuality was justiciable, despite lack of indication as to when clergyman might violate law and be subject to civil enforcement and penalty provisions, simply because the government refused to disclaim an intent to enforce against clergyman);[52] ***Fourth Circuit***: *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709-711 (4th Cir. 1999) (group's challenge to 25 year old law which had never been applied to preclude the group's intended "issue advocacy" was justiciable, despite the government's disclaimer of an intent to enforce the law as to "issue advocacy," simply because the law existed and on its face presented possible enforcement threat);[53]

States Dist. Ct., 214 F.3d 4 (1st Cir. 2000).

[51] *Contra, Thomas*, 220 F.3d at 1139 (rejecting Thomas's and Baker's present religious injury from being required to violate the law or forfeit occupational liberty). *See also Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996); *Brache v. County of Westchester*, 658 F.2d 47 (2nd Cir. 1981).

[52] *Contra, Thomas*, 220 F.3d at 1139-1141 (finding threat of civil enforcement not enough, ignoring criminal penalties, and despite past enforcement plus statutory and judicial mandate to enforce). *See also Artway v. Attorney General*, 81 F.3d 1235 (3rd Cir. 1996).

[53] *Contra, Thomas*, 220 F.3d at 1140-1141 (existence of proscriptive criminal law impacting religious landlords' First Amendment rights not enough for justiciability). *See also Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986).

Fifth Circuit: *Doe v. Beaumont Ind. Sch. Dist.*, 173 F.3d 274, 280-284 (5th Cir. 1999) (parents' claim challenging "Clergy in Schools" program was justiciable despite the fact that their children had never been selected to participate, only a small number of students per year were selected, and there was no way to predict if or when children might ever be selected to participate);[54] ***Sixth Circuit***: *National Rifle Ass'n of America v. MaGaw*, 132 F.3d 272, 282-288 (6th Cir. 1997) (gun manufacturers' challenge to law was justiciable despite lack of any present or imminent enforcement because present economic injury existed and "a citizen should be allowed to prefer 'official adjudication' to public disobedience");[55] ***Seventh Circuit***: *Hays v. City of Urbana*, 104 F.3d 102, 103-104 (7th Cir. 1997) (government's claim that it would not enforce law against landlords until it received evidence of some future violation on some uncertain future date did not defeat justiciability);[56] ***Eighth Circuit***: *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-131 and n. 4 (8th Cir. 1997)

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[54]*Contra*, *Thomas*, 220 F.3d at 1139-1141(ignoring Thomas's and Baker's past, present, and intended violations of laws, emphasizing instead the inability to predict precisely when or if unmarried couples might again seek to rent from Thomas and Baker, ignoring mandate for enforcement and proscriptive nature of criminal laws). *See also Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996); *Allendale Neighborhood Ass'n v. Austin Trans. Study Pol. Adv. Comm.*, 840 F.2d 258 (5th Cir. 1988).

[55]*Contra*, *Thomas*, 220 F.3d at 1138-1141 (trivializing enforcement history, ignoring Thomas's and Baker's present religious injury, and requiring Thomas and Baker to continue "public disobedience," *i.e.*, to violate religious beliefs, until government initiated enforcement, thereby confining Thomas and Baker to state adjudicatory proceedings).

[56]*Contra*, *Thomas*, 220 F.3d at 1139-1141 (generalized threat of prosecution or enforcement at uncertain future date when violation is detected will not support justiciability, ignoring proscriptive nature of law, past enforcement, mandate to enforce, and refusal to disclaim enforcement).

(finding that FEC's past defense of civil challenges to the law demonstrated FEC's willingness to enforce the law and presented plaintiff with sufficient threat of enforcement under proscriptive law carrying criminal and civil penalties);[57] ***Tenth Circuit***: *ACLU v. Johnson*, 194 F.3d 1149, 1153-1155 (10th Cir. 1999) (plaintiffs who had never violated law, which was not yet effective, who had never been prosecuted or threatened with prosecution, and whose conduct was not even clearly covered by law, presented justiciable claim principally because of "chilling");[58] ***District of Columbia Circuit***: *Navegar, Inc. v. United States*, 103 F.3d 994, 999-1001 (D.C. Cir. 1997) (justiciability existed for arms manufacturer to challenge law, despite the lack of any prosecution or threat of prosecution, simply because the proscriptive law clearly applied to the plaintiffs).[59]

III. THIS CASE INVOLVES IMPORTANT UNANSWERED QUESTIONS OF CONSTITUTIONAL LAW

This case presents important recurring questions of federal constitutional law regarding (1) the circumstances under which Article III allows a civil rights litigant to mount a First

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[57] *Citing FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) and *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991) as evidence of FEC's intent to enforce law. *Contra*, *Thomas*, 220 F.3d at 1139-1141.

[58] "No one should have to go through being arrested for a [crime] . . ., publicly shamed, and pay for a defense only to have a court find that the newly enacted statute is unconstitutional." *Id.* at 1154. *Contra*, *Thomas*, 220 F.3d at 1139-1141. *See also Powder River Basin Res. Coun. v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995).

[59] *Contra*, *Thomas*, 220 F.3d at 1139-1141.

Amendment pre-enforcement challenge to proscriptive laws carrying criminal and civil penalties; (2) what constitutes a credible threat of prosecution or enforcement for purposes of identifying Article III standing and ripeness; and (3) what constitutes a moribund law in desuetude as in *Poe*. As the divergence between the Ninth Circuit's *Thomas* decision and the decisions of other Circuit Courts of Appeal demonstrates, the line of reasoning which stretches from *Poe* to *Epperson* to *Bolton* to *Lyons* to *Booksellers* is not clear. This Court's direction and clarification is required so that lower courts may apply a uniform rule of law under Article III regarding standing and ripeness in First Amendment pre-enforcement actions.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: October 2, 2000